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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 807

ORVAL CARE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i-vi) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1956 (Pet. App. i-vi). The petition for a writ of certiorari was filed on March 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether nontaxpaid liquor and illicit distilling apparatus was obtained by an unlawful search when officers entered a concealed reinforced cave, separated from petitioner's dwelling house by a plowed field, a fence, and a road, for a total distance of over 125 yards.

2. Whether, in any event, the search was authorized by permission to search granted by petitioner 20 days before, the search having then been pursued for several hours and interrupted by the calling away of the officers on another assignment.

### STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Tenth Circuit affirming the judgment of the District Court for the Western District of Oklahoma finding petitioner guilty (upon plea of not guilty, and trial before the court without a jury (R. 4, 12, 60)) of possession of nontaxpaid spirits (Counts I and IV), removing and concealing nontaxpaid spirits with intent to defraud (Counts II and V), and removing and concealing nontaxpaid spirits in a place other than a bonded warehouse (Counts III and VI), in violation of 26 U.S.C. 2803, 3321, and 2913 (R. 1-4, 9-10).[1] Sentence was suspended and petitioner was placed on probation for five years (R. 9-10).

The evidence may be summarized as follows:

On November 15, 1954, officers of the Alcohol and Tobacco Tax Unit of the United States Treas-

[1] Counts I, II, and III relate to 695 gallons, Counts IV, V, and VI to three and one-half gallons.

ury Department went to petitioner's ranch upon complaint that there was a still on the ranch (R. 16, 21-22, 24). Officer Nay, called as a witness by petitioner (R. 15), testified that he apprised petitioner of the complaint, and that (R. 22):

> [Petitioner] said, "Well, all right, if you can find it." I talked to him about searching the place and he told me to go ahead and search all I wanted to. * * *

Officer Akers, it was stipulated, would have given substantially the same testimony as Nay (R. 7). Petitioner testified, to the contrary, that he did not grant permission to search (R. 57). The trial judge found the fact to be that the permission was granted (R. 61).

The search proceeded for several hours over a great deal of the property (R. 21, 24) but was interrupted by the calling of the agents to another assignment (R. 24, 32). On December 3, 1954, the agents found 695 gallons of whiskey in a thicket on land adjoining petitioner's ranch, about a mile and a quarter east of petitioner's house, together with some of the parts for a still (R. 7, 32). The land was leased to petitioner's brother but the brother did not live there, and petitioner tended the brother's cattle on the land (R. 33-35, 53). Petitioner denied ownership or knowledge of the whiskey (R. 8).

On the following day, December 4, 1954, agents Nay and Akers returned to petitioner's ranch to complete the interrupted search and to obtain pe-

titioner's explanation of the 695 gallons of liquor and parts for a still (R. 32-33). They found no one at home. They made no search of the home or nearby buildings (R. 26, 41). Akers went along a road in the car and Nay left the house, proceeded down from the bluff upon which the house was situated (R. 18-19, 30), crossed a public road, and entered a freshly plowed field of two and one-half or three acres, separated from the house not only by the height of the bluff and by the road but by a mesh wire fence enclosing the field (R. 18, 28, 30, 38-40, 47, 50). He followed a small trail to a creek (R. 20, 28). His attention was caught by a thistle or tumbleweed on a flat piece of ground standing in a manner that "just looked out of place" (R. 28). Approaching the thistle, Nay noticed an odor of mash, and upon picking up the thistle he discovered that it had covered a square, boarded hole going down into a cave (R. 28). The cave had been made in a natural ditch, some 125 yards northwest of the house (R. 17), by widening the ditch, covering the space with heavy timbers, and sodding over the top so that it would be the same level as the top of the ditch and "absolutely indistinguishable from anywhere" (R. 28-30). One end of the cave was closed off with grain doors ordinarily used to close freight cars and covered up with thistles (R. 28, 29).

The cave contained elaborate equipment for making whiskey, together with a stack of 10, 15, 30, and 40 gallon kegs similar to those found with the 695 gallon cache. There were numerous in-

dications of use, and the parts in the cave together with parts found with the 695 gallons of whiskey (which fitted the coil in the cave) lacked only a cooker and doubler to constitute all the component parts of a still (R. 8, 31, 41-45). Three and one-half gallons of "moonshine whiskey" were found in a jug in the cave (R. 7, 47-48), together with a quart of colored whiskey (R. 42, 44). Petitioner stipulated to ownership of the equipment in the cave, but denied that the three and one-half gallons of liquor were whiskey and denied the 53.4 proof alcohol content (R. 8, 23, 46, 57).

Electric current was conducted to the cave by a buried wire, which the officers traced to a point behind the garage by reason of the little depression made in laying the wire. The officers traced it no further but later learned from petitioner that the connection continued on to the house (R. 20-21, 46). Light wires for petitioner's chicken house, barn, and shop were not thus concealed, but were on poles (R. 40-41).

At the trial, petitioner pleaded not guilty (R. 12) and moved, *inter alia,* for suppression of evidence obtained by search "within the curtilage of his home" (R. 4). In support of the motion, petitioner called Nay as his witness (R. 15) and himself gave testimony—limited to the question of curtilage (R. 48)—to the effect that his children, now 21 and 18 and living away from home, once played in the fenced-in acreage, that he kept farm machinery and equipment in it (although not at that time), that the cave and its equipment was

used for soaking grain to be fed pigs, and that the cave was used as a refuge "if it is storming bad" (R. 49-52, 56). He stated that the road separating the house from the field below was not a public road (R. 51). Upon examination by the trial judge, petitioner admitted that the fenced-in field had been plowed for the purpose of sowing for pasture (R. 52), and that any pig troughs were on the house side of the field and not connected with the cave, but twenty-five yards across the field from it, "maybe a little farther" (R. 54-55).

The district court overruled the motion to suppress evidence, finding that the cave was used only as a distillery, "separate and apart and distinct from [petitioner's] home as one could be." He also found that petitioner had authorized the agent to search, and that the search was made "in the exercise of that authority given to him by this defendant" (R. 6, 58).

The Court of Appeals observed that petitioner's evidence had failed to convince the district court that the cave was within the curtilage, "nor are we persuaded by it." (Pet. App. v-vi). In that view the Court of Appeals found it unnecessary to consider the issue of permission to search (Pet. App. v).

## ARGUMENT

1. The cave here involved, far from being any part of petitioner's house or domestic group of buildings, was essentially only the widened part of a creek or ditch bed, covered over with beams and carefully camouflaged to appear flush with the

ground. While petitioner at the trial sought to term it a "shed" or "feed house" (R. 8, 16, 20, 23, 41), the evidence shows that he had done everything possible to keep it apart from his home and to conceal it. The cave was within an enclosure of some two and a half to three acres of plowed field fenced off from the house, and separated by a public road, and by a steep incline to the bluff upon which petitioner's house was situated. The cave was over 125 yards from the house and no amount of reference at the trial to the plowed area as a "back yard" or "rear of his home" (R. 8, 24, 35-36, 50, 52) could transform this open field into any semblance of a curtilage. Even the sole connection with the house—the wire for electric power—was concealed underground, as distinguished from the open connections on poles to the barn, chicken house, and shop.

The trial judge and the Court of Appeals were clearly under no misapprehension of the law in appraising the specific facts of the case. They were aware of, and adverted to, the considerations that would have been involved had buildings truly within the curtilage been searched (R. 14-15, 59; Pet. App. v-vi), but they were equally aware of the different principle laid down by this Court in the case of a search over an open field. This Court long ago pointed out that the constitutional protection of a person in his home does not create an unlimited extension off into space, preventing any and all investigations not related to the home itself. *Hester* v. *United States*, 265 U. S. 57, 59.

The case of *Taylor* v. *United States*, 286 U. S. 1, to which petitioner alludes (Pet. 7), was clearly within the cognizance of the court below, but the search there was of a garage "adjacent to the dwelling," on a city lot (286 U. S. at 5).[2]

Petitioner's efforts to evoke some connection between his home and the cave in a creek bed were properly discounted. Petitioner argued that the field had in the past been a play area for his children, but they admittedly were then 18 and 21 years of age and both living away from the farm. Petitioner further urged that the distilling equipment was for soaking feed for pigs, but there were only a few pigs visible on the farm (R. 47), and the placement of the pig troughs clearly negated the claimed use of the cave as a source of feed (see *supra*, p. 6). The contention that the fenced field served as a place to store larger equipment was negatived by the fact that no equipment appeared in the field. Similarly slender were the efforts to bring the dugout into connection with the house as a storm refuge and to urge that the road separating the plowed field from the house was a private and not public road because it was obstructed, at points, by gates rather than ordinary cattle guards. The trial judge—who had petitioner before him and could personally evaluate the credibility of petitioner's statements—found that:

[2] *Trupiano* v. *United States*, 334 U.S. 699, cited by petitioner (Pet. 7), dealt only with the issue as to whether the search, under the facts of that case, was a proper incident to arrest. It may be observed, however, that the subject of the midnight raid there involved was a barn.

> [A]t the time this cave was searched, it was out in the field, a plowed field, and I don't believe his testimony at all that it was used for a storm cave and all of the evidence points conclusively to the fact it was used as a distillery, which I believe it was, and it was a distillery separate and apart and distinct from his home as one could be * * * [R. 57-58].
>
> * * * * *
>
> [I]t was just a very skillful way of hiding a large distillery, and the wires even, the electric wires, were even buried so there would be no indication that there was electricity out there. * * * [R. 61.]

2. The trial judge also found that petitioner, several weeks before, had given the federal officers permission to search. The fact of this permission and its coverage of the later continuation of the search were clearly matters upon which the trial judge was in the best position to evaluate the government testimony as against that of petitioner. The judge did not believe the petitioner. While the Court of Appeals, in sustaining the judgment, found it unnecessary to pass upon the matter of permission, the finding of the trial judge remains in full force and is, we submit, itself dispositive of petitioner's contentions. *Campbell* v. *United States*, 151 F. 2d 605 (C.A. 6).

CONCLUSION

The decision below is a proper application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 [illegible]